CRIMINAL ATTEMPTS.

AN attempt to commit any crime, treason, felony, or misdemeanor, is itself criminal, though the attempt fails.[1] The attempt is not criminal *per se*, that is, the act of attempt is not in itself harmful to the state. The crime is a mere shadow of the attempted offense, deriving its criminal nature entirely from the substantive offense to which it is subsidiary. It has, nevertheless, the qualities and characteristics of other crimes. It consists of a criminal act done with criminal intent, and the act includes not merely a physical act, but also a specific intent.

As in the case of other crimes, one cannot be punished for a criminal attempt unless at the time of committing the offense he had the guilty mind, the *mens rea;* but this requirement usually causes no difficulty, for the intent to commit the crime attempted will, save in an exceptional case, amount to a guilty mind. In addition to the general requirement of *mens rea*, the crime of attempt also necessarily involves a specific intent, the intent to accomplish the crime attempted. One cannot attempt or try[2] to do an act without the intent to do the act. The specific intent

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[1] Anon., Russ. & Ry. 107; R. *v.* Butler, 6 C. & P. 368; R. *v.* Roderick, 7 C. & P. 795; P. *v.* Burns, 69 Pac. Rep. 16 (Cal.); *In re* Lloyd, 51 Kan. 501, 33 Pac. Rep. 307; S. *v.* Jackson, 73 Me. 91, 40 Am. Rep. 342; C. *v.* Tolman, 149 Mass. 229, 21 N. E. Rep. 377; Smith *v.* C., 54 Pa. St. 209 (*semble*); C. *v.* Jones, 22 Pitts. Leg. J. 55; S. *v.* Maner, 2 Hill (S. C.) 453; Nicholson *v.* S., 9 Baxt. 258; C. *v.* Chapman, 1 Va. Cas. 138.

In Tennessee this appears to be confined to attempts to commit felonies: Whitesides *v.* S., 11 Lea 474.

In jurisdictions where "the common law of crime has been abolished," *i. e.* where nothing is an offense unless made so by statute, an attempt to commit a certain crime may not be criminal because of the failure of any statute to declare it so. *In re* Guayde, 112 Fed. Rep. 415; Kinningham *v.* S., 120 Ind. 322. See the peculiar doctrine of Wisconsin: S. *v.* Goodrich, 84 Wis. 359, 54 N. W. Rep. 577; S. *v.* Lewis, 113 Wis. 391, 89 N. W. Rep. 143.

It may be doubted whether this general statement is not a little too broad. An attempt to commit a mere simple assault without battery would probably be regarded as of too slight consequence for punishment. This is certainly true where assault is defined by statute as an attempt to commit a battery (Wilson *v.* S., 53 Ga. 205; White *v.* S. 22 Tex. 608), since an attempt to attempt is not a crime. Wilson *v.* S., 53 Ga. 205; Patrick *v.* P., 132 Ill. 529, 24 N. E. Rep. 619; S. *v.* Sales, 2 Nev. 268; S. *v.* Baller, 26 W. Va. 90, 53 Am. Rep. 66.

[2] These terms are synonymous: Lewis *v.* S., 35 Ala. 380; Bordeaux *v.* Davis, 58 Ala. 611.

to accomplish the crime alleged to have been attempted must therefore be alleged and proved,[1] and drunkenness may be shown to disprove the existence of such intent.[2]

An attempt involves, of course, more than a mere intention; it involves doing a criminal act.[3] And this act of attempt must be described in the indictment;[4] "attempted to commit the crime of murder" is not a sufficient description of crime. It is however usually held (often in accordance with a statute, but sometimes apparently at common law) that one may be convicted of an attempt upon an indictment for the substantive offense attempted; thus punishing for an act not described in the indictment.[5]

In order to constitute an act of attempt, the act must possess four characteristics: first, it must be a step toward a punishable offense; second, it must be apparently (but not necessarily in reality) adapted to the purpose intended; third, it must come dangerously near to success; fourth, it must not succeed. Each of these requirements must be examined with some attention.

I. An Attempt is a Step toward a Crime.

An attempt may be described as an act regarded as a step toward another act. Most acts are done with a view to bring about a considerable chain of consequences; for instance, one who puts poison in the cup of another has several intents. He intends that the other shall take the cup into his hand, that he shall drink the poison, that the poison shall take effect upon the tissues of his body, that he shall leave his property by will to the wrongdoer. Each of these things may properly be described as the intent with which the actor put the poison into the cup. Each of these results may be taken by the law as an important fact having certain legal consequences; and as to each fact of this sort we may regard the act of putting poison into the cup as an attempt to do it, that is, as a step toward the completion of the ultimate fact selected, further from accomplishment as the fact

[1] Scott *v.* P., 141 Ill. 195, 30 N. E. Rep. 329.

[2] R. *v.* Doody, 6 Cox C. C. 463.

[3] S. *v.* Marshall, 14 Ala. 410; Kelly *v.* C., 1 Grant Cas. 484.

[4] Thompson *v.* P., 96 Ill. 158; C. *v.* Peaslee, 177 Mass. 267, 59 N. E. Rep. 55; S. *v.* Colvin, 90 N. C. 717; Randolph *v.* C., 6 S. & R. 398; C. *v.* Clark, 6 Gratt. 675.

[5] R. *v.* Hapgood, L. R. 1 C. C. 221; P. *v.* Lowen, 109 Cal. 381, 42 Pac. Rep. 32; S. *v.* Shepard, 7 Conn. 54; S. *v.* Atherton, 50 Ia. 189, 32 Am. Rep. 134; P. *v.* Webb, 127 Mich. 29, 86 N. W. Rep. 406; S. *v.* Frank, 103 Mo. 120, 15 S. W. Rep. 330; S. *v.* Archer, 54 N. H. 465.

selected is further on in the chain of consequences. Now if any fact in this chain is regarded by the law as a criminal offense, the act of putting the poison into the cup may be regarded as an attempt to commit such offense; the later consequences intended then become entirely unimportant, and the consequences earlier than the criminal one are of importance only as showing the intended connection between the act done and the consequence selected by the law as criminal. In investigating criminal attempt, therefore, we are to consider, first, what was the intended result which is regarded by the law as a criminal act; and secondly, what has the defendant done as a step toward bringing about that result. All other intents than the one to do the act in question then become unimportant; and the acts actually done are regarded as so many steps toward the accomplishment of the act intended to be done.

To illustrate, let us suppose in the example already suggested that the intended victim of the poison had at the time the poison was put in the cup been dead. Could the poisoner be indicted for a criminal attempt to kill? In such a case the criminal act of killing would be bringing the poison into harmful contact with the tissues of a living body. The poisoner took a step toward bringing the poison into contact with the tissues of what was in fact a dead body. Such a thing is not criminal. The act toward which he proceeded was not the contact of the poison with a living body, but the contact of the poison with the dead body. He intended also, to be sure, that the victim should die from the poison; but the point in the chain of results selected by the law as the criminal act is the contact of the poison with the tissues of the body. The physical harm, not the death of the victim, is the criminal act; the death, being subsequent, is, as we have seen, an immaterial factor in considering the attempt to commit the crime.

It is quite true that in the ordinary use of language a man attempts to bring about results as well as to do acts; that when a murderer in intention fires a pistol he is attempting not only to put a bullet into the object aimed at, but to cause the death of his intended victim, who may be a hundred miles away. But attempt in that sense, having a mere mental connection with the intended result, is not the concern of the criminal law, which punishes physical acts only. The important question is, what is the physical act which the defendant has set out to do; for to bring about

a harmless physical result in the vain hope of effecting a crime is not criminal. An attempt which is to form the subject of a criminal inquiry must therefore be a step toward a forbidden physical act. If the entire physical act which the accused has at this time set out to perform might be accomplished without committing a substantive crime, the attempt, not being an actual step toward a criminal act, cannot be criminal.

It must be confessed that this doctrine has not always been recognized. The earlier cases spoke of punishment for attempt as if it were a punishment of the criminal intent whenever evidenced by an act, even though the act was in itself harmless. The same idea, not uncommonly held even now, was well expressed by Jervis, C. J., in Regina *v.* Roberts:[1] "The guilt consists in the intent evidenced by the overt act." The same idea influenced the wording of a statute which is common in this country: "Whoever attempts to commit an offense prohibited by law and in such attempt does any act towards the commission of such offense . . . shall be punished." But in spite of these opinions, the law regards attempt, like any crime, as an act punishable in itself, and not merely as the proof of a criminal intent.

If then the physical act intended is not a crime, the attempt to do it cannot be criminal.[2] This principle may be made clearer by a few illustrations. The defendant wishing to kill an enemy shoots toward an imperfectly seen object which he believes to be his enemy. The object proves to be an animal or a stump. Whether the bullet misses its mark or hits it, the act is not criminal, for the thing which the actor aims to do is to bring his bullet into violent contact with the object seen. If he does so, he commits no crime; if he attempts to do so, he equally commits no crime.[3] It is immaterial that his ultimate purpose is to have his enemy die. The criminal act of homicide by shooting is the act of contact with the body shot. If the act of contact with the body shot is not an act of homicide, there is no crime in the attempt, and the desired ultimate result of the contact is immaterial. On the other hand, suppose the body aimed at had in fact been the actor's enemy, but for protection he wore armor capable of stopping a pistol bullet. Whether the actor's bullet goes astray or is stopped by the armor, he has equally failed to bring about that intended contact with the

[1] Dears. 539, 25 L. J. M. C. 17.

[2] Marley *v.* S., 58 N. J. L. 207, 33 Atl. Rep. 208.

[3] R. *v.* McPherson, Dears. & B. 197, 201, *per* Bramwell, B.

body at which he shot which the law selects as the criminal act. If the contact had been brought about, the act would have been one of criminal homicide or at least of battery; having failed, the actor has made a criminal attempt.

In a California case it appeared that the occupant of a house heard a step of a policeman on the roof and believed he saw the policeman looking down through a hole in the roof, and he thereupon shot toward the hole. The policeman was in fact upon another part of the roof and was unharmed. Whether he was guilty of an attempt to kill must depend upon the question, what in fact was the contact into which he purposed to bring the bullet he fired? If he intended to bring his bullet into contact with a policeman supposed to be behind the hole in the roof, his act if carried to the intended physical contact would have been criminal, and he was accordingly guilty of an attempt to kill.[1] If, on the other hand, he took the hole with the light shining through it for a human eye, and shot to put his bullet into the supposed eye, since the supposed eye was only a lighted hole, the intended contact was not criminal and he was not guilty of a criminal attempt.

In another case the defendant, an American soldier, desired to desert to the enemy; and seeing a body of troops which he took to be the enemy, he started toward them, but was stopped before reaching them. The troops were in fact American troops. He intended to walk in a certain direction for a certain distance, to join certain troops which he saw, and thereby to become a soldier of the enemy. His starting was an attempt to do each of these things. The only act in the series which was alleged in the indictment as criminal was the act of joining the troops he saw; but since the troops were American troops the act would not be criminal, and he was therefore guilty of no criminal attempt.[2]

Other illustrations of the same principle are not wanting. So where abortion before the child quickens is not criminal, an attempt to commit abortion at such a period is not criminal,[3] and so an offer to bribe a councilman to vote for one for an office which has ceased to exist is not a crime, since it could not be criminal for the councilman, from whatever motive, to vote for the person in question for the office.[4]

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[1] It was so held. P. *v.* Lee Kong, 95 Cal. 666, 30 Pac. Rep. 800; *acc.* S. *v.* Mitchell, 71 S. W. Rep. 175 (Mo.).

[2] Resp. *v.* Malin, 1 Dall, 33.

[3] S. *v.* Cooper, 2 Zab. 52.

[4] C. *v.* Reese, 16 Ky. L. Rep. 493, 29 S. W. Rep. 352.

II. Adaptation of Means to Result.

An attempt cannot be criminal unless there is at least some apparent adaptation of means to result. If nothing is done which could by any possibility result in the desired end, the public cannot be harmed even in tendency, and the act cannot be criminal. "If a statute simply made it a felony to attempt to kill any human being, or to conspire to do so, an attempt by means of witchcraft, or a conspiracy to kill by means of charms and incantations, would not be an offense within such a statute. The poverty of language compels one to say, 'an attempt to kill by way of witchcraft,' but such an attempt is really no attempt at all to kill.[1] It is true the sin or wickedness may be as great as an attempt or conspiracy by competent means; but human laws are made, not to punish sin, but to prevent crime and mischief." [2]

In accordance with this doctrine it has been held that throwing gunpowder against a house (gunpowder not exploding by mere contact) is not an attempt to injure by an explosive; [3] that striking with a small stick is not an attempt to kill; [4] and that mixing cantharides in the coffee of an intended victim is not an attempt to rape,[5] since the drug has no tendency to overcome the will.

But though the means must be apparently adapted to the end, it is not necessary that the end should in fact be possible of accomplishment by the means chosen. Every attempt to be punishable must be a failure, and must in fact have been doomed to failure from the moment the doer acted. It is absolutely impossible to kill a man with a bullet if the man is wearing bullet proof armor; it is equally impossible to kill him if the bullet is so aimed as to pass a hundredth of an inch beside him; but in both cases an attempt may be made to kill him. It is impossible for a pickpocket to steal a watch from a pocket which has no watch in it; it is equally impossible to steal a watch which is attached to the person of the wearer by a chain which cannot be broken; and again, it is equally impossible to steal by a hand so large or so

[1] This seems hardly accurate. There is really an attempt, but one of such slight importance that the criminal law need not notice it.

[2] Pollock, C. B., in Atty. Genl. *v.* Sillem, 2 H. & C. 431, 525.

[3] R. *v.* Sheppard, 11 Cox C. C. 302. Though the offense is not quite that stated, but a statutory one, it would seem that the *ratio decidendi* is the same.

[4] Kunkle *v.* S., 32 Ind. 220.

[5] S. *v.* Lung, 21 Nev. 209, 28 Pac. Rep. 235.

clumsy that the wearer of the watch will feel it. In all these cases it is possible to try to steal the watch. "To allow him immunity on the ground that this part of his expectation was ill grounded would be as unreasonable as to let a culprit off because he was not warranted in thinking that his pistol was pointed at the man he tried to shoot."[1]

In accordance with this general doctrine, it has been held that the crime of attempting to extort money may be committed though the victim (being in communication with the authorities) did not fear the threats;[2] of attempting to obtain by false pretenses though the pretenses were not believed;[3] of attempting to bribe or to influence the action of a public officer, though the officer had no legal power to bring about the desired result.[4] So a solicitation to leave the state in order to enlist is criminal, though the person solicited would not be accepted as a soldier;[5] and a cutting with intent to kill may be committed, though the wound given is not calculated to cause death.[6]

This question has been much considered in prosecutions for attempting to pick an empty pocket. In an early English case it was held that such an act could not be an attempt to commit larceny, since the act intended was impossible of performance.[7] This case, however, has been overruled,[8] and it is now settled law in England that an attempt may be criminal though accomplishment was impossible in the nature of things.[9] In this country such

[1] HOLMES, J., in C. *v.* Kennedy, 170 Mass. 18, 21, 48 N. E. Rep. 770. See also S. *v.* Mitchell, 71 S. W. Rep. 175 (Mo.).

[2] P. *v.* Gardner, 144 N. Y. 119, 38 N. E. Rep. 1003.

[3] R. *v.* Mills, 7 Cox C. C. 263 (*semble*); R. *v.* Hensler, 22 L. T. Rep. 691, 19 W. R. 108, 11 Cox C. C. 570. See C. *v.* Starr, 4 All. 301.

[4] *In re* Bozeman, 42 Kan. 451, 22 Pac. Rep. 628; S. *v.* Ellis, 4 Vr. 102, 97 Am. Dec. 707.

[5] C. *v.* Jacobs, 9 All. 274.

[6] R. *v.* Griffith, 1 C. & P. 298. See R. *v.* Brown, 63 J. P. 790.

[7] R. *v.* Collins, L. & C. 471, 33 L. J. M. C. 177, 10 Jur. N. S. 686, 10 L. T. Rep. 581, 12 W. R. 886, 9 Cox C. C. 497, so held, following the earlier case of R. *v.* McPherson, D. & B. 197, 26 L. J. M. C. 134, 3 Jur. N. S. 523, 5 W. R. 525, 7 Cox C. C. 281. In the latter case the goods intended to be stolen were named in the indictment, and it was proved that they were not in the house; and two of the judges put their judgments distinctly on this ground. Other judges, however, decided the case on the ground that the attempt was impossible of fulfillment. See R. *v.* Johnson, L. & C. 489, 34 L. J. M. C. 24, 10 Jur. N. S. 1160, 11 L. T. Rep. 389, 13 W. R. 101, 10 Cox C. C. 13, where it was held that the goods intended to be stolen need not be described in the indictment.

[8] R. *v.* Ring, 61 L. J. M. C. 116, 66 L. T. Rep. 300, 17 Cox C. C. 491, 56 J. P. 552.

[9] R. *v.* Brown, 24 Q. B. D. 357, 59 L. J. M. C. 47, 61 L. T. Rep. 594, 38 W. R. 95, 16 Cox C. C. 715, 54 J. P. 408.

has always been recognized to be the law. One who tries to pick an empty pocket is guilty of attempt to commit larceny.[1] So it is held burglary to break into a dwelling-house in the night time with intent to steal whatever is in it, though there is nothing in it to be subject of larceny,[2] or not enough to make the offense grand larceny and therefore felonious.[3]

It might be claimed that since there is nothing to take from the pocket the act intended cannot be a criminal act, and therefore there can be no criminal attempt. But the act intended is not merely putting the hand into the pocket, but also clasping it around something within the pocket and pulling it out; and the actor fails to do the act he set out to do if nothing is removed from the pocket. If that is true, a successful accomplishment of his act would obviously have been criminal, and the act is therefore a criminal attempt. If, however, the immediate purpose of the defendant was merely to feel in the pocket to see if there was anything in it, there was no criminal attempt, though if anything was discovered in the pocket the defendant would doubtless have tried to get it out.[4]

A class of cases in which this general principle appears to have been lost sight of by the courts consists of cases where boys under the age of fourteen have tried to commit rape. The indictment is sometimes for attempt, usually for assault with intent to commit rape; and it is almost universally held that since the boy cannot by law be guilty of rape he cannot be guilty of the attempt or the assault with intent.[5] Different reasons have been suggested for this rule. The commonest (though hardly convincing) is that the defendant being presumed, whether conclusively or not, to be incapable of rape, is presumed incapable of intending to commit rape. "It is a logical solecism," said one court,[6] "to say that a person can intend

[1] S. *v.* Wilson, 30 Conn. 500; Hamilton *v.* S., 36 Ind. 280, 10 Am. Rep. 22; C. *v.* McDonald, 5 Cush. 365; C. *v.* Sherman, 105 Mass. 169; P. *v.* Jones, 46 Mich. 441; P. *v.* Moran, 123 N. Y. 254, 25 N. E. Rep. 412; S. *v.* Utley, 82 N. C. 556; Clark *v.* S., 86 Tenn. 511.

[2] S. *v.* Beal, 37 Oh. St. 108, 41 Am. Rep. 490.

[3] Harvick *v.* S., 49 Ark. 514.

[4] R. *v.* Taylor, 25 L. T. Rep. 75.

[5] R. *v.* Eldershaw, 3 C. & P. 396; R. *v.* Phillips, 8 C. & P. 736; R. *v.* Waite, [1892] 2 Q. B. 600; R. *v.* Williams, [1893] 1 Q. B. 320; S. *v.* Handy, 4 Harr. (Del.) 566 (*semble*); McKinny *v.* S., 29 Fla. 565, 10 So. Rep. 732; P. *v.* Randolph, 2 Park. Cr. 213; S. *v.* Sam, 1 Winst. 300; Foster *v.* C., 96 Va. 306, 31 S. E. Rep. 503. *Contra*, Davidson *v.* C., 20 Ky. L. Rep. 540, 47 S. W. Rep. 213; C. *v.* Green, 2 Pick. 380.

[6] S. *v.* Sam, *supra*.

to do what he is physically impotent to do;" a line of reasoning which would seem to prove it impossible for a man to intend to lead a Christian life. Another court[1] stated the same idea in other language:

"The accused being under fourteen years of age, and conclusively presumed to be incapable of committing the crime of rape, it logically follows, as a plain legal deduction, that he was also incapable in law of an attempt to commit it. He could not be held to be guilty of an attempt to commit an offense which he was physically impotent to perpetrate."

Why not, one might ask, is the weaker and less skilled of two contending foot-ball teams incapable of trying to win the game? The logic of the Massachusetts court was sounder, if less dramatic:[2] "An intention to do an act does not necessarily imply an ability to do it."[3]

When the case is reversed, the court appears to have no difficulty. One may be convicted of attempt or assault with intent to ravish, though, owing to the youth or other quality of the object of the attack, the crime is impossible of accomplishment.[4]

A class of cases which seems at first opposed to the doctrine just laid down consists of prosecutions for the statutory offense of attempt to discharge a loaded firearm. The defendant is acquitted if there was no priming;[5] but this is not on the ground that there is no attempt, but that the firearm is not loaded. The same reason leads to acquittal where the flint is lacking,[6] and where the touch-hole is plugged.[7] Similarly one cannot be guilty of the statutory offense of "attempting to discharge firearms by drawing the trigger or similar means" where the pistol was not cocked.[8] On the other hand, the firearm is loaded under the statute when (being a revolver) it contains an unused cartridge, though the hammer happens to fall upon a spent cartridge.[9]

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[1] Foster *v.* C., *supra.*

[2] C. *v.* Green, *supra.*

[3] Williams *v.* S., 14 Oh. 222, 45 Am. Dec. 536, is sometimes wrongly cited as in agreement with the Massachusetts case. It simply held that the presumption of inability to commit rape might be rebutted.

[4] R. *v.* Brown, 24 Q. B. D. 357; C. *v.* Shaw, 134 Mass. 211; Rhodes *v.* S., 1 Coldw. 351.

[5] R. *v.* Carr, Russ. & Ry. 337; R. *v.* James, 1 C. & K. 530, 1 Cox C. C. 78; R. *v.* Gamble, 10 Cox C. C. 545.

[6] R. *v.* Lewis, 9 C. & P. 523; and see Mulligan *v.* P., 5 Park Cr. 105.

[7] R. *v.* Harris, 5 C. & P. 159.

[8] R. *v.* St. George, 9 C. & P. 483.

[9] R. *v.* Jackson, 17 Cox C. C. 104.

Another statutory offense of a similar nature is shooting at another with intent to kill. On this charge it has been held in England that the defendant may be convicted though in fact the gun was not so loaded as to be capable of killing.[1] In this country, however, it is held, it would seem wrongly, that the defendant cannot be convicted if the gun was insufficiently loaded.[2] But where the charge was merely assault with intent to kill, the defendant was convicted though he made the assault with a gun which in fact was not loaded.[3]

Still another set of decisions must be distinguished as turning upon the language of a statute. A statute punishes the administration of a noxious thing with intent to procure an abortion. To come under the statute the substance must be poisonous,[4] and therefore if it is harmful only in large quantity, a small quantity, not being noxious, does not satisfy the statute.[5] The substance must also be administered; that is, it must reach the stomach of the victim.[6] But if it is noxious and is administered with the required intent, the crime is committed, although the poison is not calculated to accomplish the object.[7]

In several similar cases the possibility of success is not regarded. Assault with intent to kill by poison may be committed though the poison cannot kill.[8] So on an indictment for administering with intent, it appeared that the poison was a berry which, when administered, was contained in a harmless pod; the pod was so hard that the victim could not digest it, and it passed out from the victim's body unbroken. The defendant was held guilty.[9] The defendant may be convicted of using a noxious thing or an instrument with intent to cause abortion, though the woman is not with child.[10]

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[1] R. *v.* Kitchen, Russ. & Ry. 95. R. *v.* Abraham, 1 Cox C. C. 208, which seems *contra*, appears to have been decided upon the special facts proved.

[2] Allen *v.* S., 28 Ga. 395; S. *v.* Swails, 8 Ind. 524, 65 Am. Dec. 772; Vaughan *v.* S., 3 Sm. & M. 553; Henry *v.* S., 18 Oh. 32.

[3] Mullen *v.* S., 45 Ala. 43, 6 Am. Rep. 691.

[4] R. *v.* Powles, 4 C. & P. 571; S. *v.* Clarissa, 11 Ala. 57.

[5] R. *v.* Hennah, 13 Cox C. C. 547.

[6] R. *v.* Cadman, Car. Supp. 237, 4 C. & P. 370; Sumpter *v.* S., 11 Fla. 247.

[7] R. *v.* Phillips, 3 Camp. 73; R. *v.* Coe, 6 C. & P. 403; Dougherty *v.* P., 1 Col. 514; S. *v.* Fitzgerald, 49 Ia. 260, 31 Am. Rep. 148; S. *v.* Owens, 22 Minn. 238; S. *v.* Gedicke, 43 N. J. L. 86; C. *v.* W., 3 Pitts. 463.

[8] S. *v.* Glover, 27 S. C. 602, 4 S. E. Rep. 564.

[9] R. *v.* Cluderay, 1 Den. C. C. 515, 2 C. & K. 907, T. & M. 219, 19 L. J. M. C. 119, 14 Jur. 71, 4 Cox C. C. 84.

[10] R. *v.* Goodhall, 1 Den. C. C. 187; C. *v.* Tibbetts, 157 Mass. 519, 32 N. E. Rep. 910.

III. Dangerous Proximity to Success.

The attempt must come sufficiently near completion to be of public concern. How near to success the attempt must come is obviously a question of degree to be determined in each case upon the special facts of the case. Attempts have been made to find a legal test to satisfy this question. It has been suggested for instance that to be punishable an attempt must be the last act before success; there must remain no *locus pœnitentiæ*.[1] But while such a formula may sometimes furnish a useful suggestion for determining the question, it cannot properly be regarded as a legal rule.[2] As Holmes, C. J., said, in Commonwealth *v.* Peaslee :[3]

"That an overt act, although coupled with an intent to commit the crime, commonly is not punishable if further acts are contemplated as needful, is expressed in the familiar rule that preparation is not an attempt. But some preparations may amount to an attempt. It is a question of degree. If the preparation comes very near to the accomplishment of the act, the intent to complete it renders the crime so probable that the act will be a misdemeanor, although there is still a *locus pœnitentiæ*, in the need of a further exertion of the will to complete the crime."

In fact, literal adherence to the rule suggested would probably prevent punishment in most cases charged as attempts, since the final act before complete success will seldom be accomplished without success following. Most decided cases of attempt, it will be found, are far from being the last acts before complete success.

The same general doctrine has been put in other forms. Thus it has been laid down that to be a punishable attempt the defendant's act, unless interrupted by natural causes outside his control, should necessarily result in the criminal act.[4] "Unless the transaction had been interrupted as it was, the prisoner would have actually carried away the meat."[5] As Parke, B., said in Regina *v.* Eagleton:[6]

"If in this case any further step on the part of the defendant had been necessary to obtain payment, . . . we should have thought that the obtaining credit with the relieving officer would not have been sufficiently proxi-

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[1] Lovett *v.* S., 19 Tex. 174.
[2] Uhl *v.* C., 6 Gratt. 706.
[3] 177 Mass. 267, 272, 59 N. E. Rep. 55.
[4] U. S. *v.* Stephens, 8 Sawy. 116; Sipple *v.* S., 46 N. J. L. 197.
[5] Blackburn, J., in R. *v.* Cheeseman, 31 L. J. M. C. 89, 90.
[6] 24 L. J. M. C. 158, 166.

mate to the obtaining the money. But on the statements in this case no other act on the part of the defendant would have been required. It was the last act *depending upon himself* towards the payment of the money, and therefore it ought to be considered as an attempt."

But this attempt to find an arbitrary rule must also be dismissed. The test loses sight of the real reason for punishing attempts, that is, the danger to the public. Very many punishable attempts fail of success though not interrupted by natural causes or by other persons than the defendant, for instance, shooting at an enemy with an ill-aimed pistol; on the other hand, many acts are punishable though to attain success they must be followed by other acts of the defendant himself, as in the series of cases on attempts to commit burglary and arson, stated later. Indeed, all the cases where a man is punished for attempt though he repented and gave up his project before success are opposed to the proposed test.[1]

The true doctrine has been so well stated by Mr. Justice Holmes that it is unnecessary to do more than quote his words:[2]

"An act may be done which is expected and intended to accomplish a crime, which is not near enough to the result to constitute an attempt to commit it, as in the classic instance of shooting at a post supposed to be a man. As the aim of the law is not to punish sins, but is to prevent certain external results, the act done must come pretty near to accomplishing that result before the law will notice it. But, on the other hand, irrespective of the statute, it is not necessary that the act should be such as inevitably to accomplish the crime by the operation of natural forces but for some casual and unexpected interference. It is none the less an attempt to shoot a man that the pistol which is fired at his head was not aimed straight, and therefore, in the course of nature, could not hit him. Usually, acts which are expected to bring about the end without further interference on the part of the criminal are near enough, unless the expectation is very absurd. . . . Every question of proximity must be determined by its own circumstances, and analogy is too imperfect to give much help. Any unlawful application of poison is an evil which threatens death according to common apprehension, and the gravity of the crime, the uncertainty of the result, and the seriousness of the apprehension, coupled with the great harm likely to result from poison, even if not enough to kill, would warrant holding the liability for an attempt to begin at a point more remote from the possibility of accomplishing what is expected than might be the case with lighter crimes. . . . In the

[1] See particularly Glover *v.* C., 86 Va. 382, 10 S. E. Rep. 420; R. *v.* Goodman, 22 U. C. C. P. 338.

[2] In C. *v.* Kennedy, 170 Mass. 18, 20, 48 N. E. Rep. 770.

case of crimes exceptionally dealt with or greatly feared, acts have been punished which were not even expected to effect the substantive evil unless followed by other criminal acts; e. g. in the case of treason (Fost. Crown Law, 196; Rex *v.* Cowper, 5 Mod. 206), or in that of pursuit by a negro with intent to commit rape (Lewis *v.* State, 35 Ala. 380)."

The act of attempt to be punishable must be more than mere preparation; a step must be taken which can be regarded as the beginning of the actual commission of the crime intended.[1] In the leading case[2] on the subject Field, C. J., said:

"Preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement toward the commission after the preparations are made."

The difference between an act of preparation and an attempt is merely one of degree, and is exceedingly difficult to apply. In People *v.* Murray[3] the charge was an attempt to contract an incestuous marriage; the defendant eloped with his niece, and tried to secure a magistrate to perform the ceremony; it was held that a punishable attempt had not been committed. In United States *v.* Stephens[4] the charge was an attempt to introduce liquor into Alaska; the defendant sent to San Francisco an order for liquor to be shipped to him in Alaska; he was discharged. In United States *v.* Riddle[5] a false invoice was made by the exporter in Liverpool with intent to defraud the revenue; it was held not to be an attempt to defraud.[6] On the other hand, in Regina *v.* Cheeseman[7] a servant who, intending later to steal his master's property, put it to one side so that he could easily make way with it, was held guilty of an attempt to steal.[8] In Cunningham *v.* State[9] the defendant had had sent to him and had received from the express company certain printed forms of auditor's warrants with stamps for impressing the auditor's seal; he was held guilty of an

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[1] U. S. *v.* Stephens, 8 Sawy. 116; P. *v.* Murray, 14 Cal. 159; Jackson *v.* S., 103 Ga. 417, 30 S. E. Rep. 251; Sipple *v.* S., 46 N. J. L. 197; Lovett *v.* S., 19 Tex. 174.

[2] P. *v.* Murray, *supra.*

[3] 14 Cal. 159.

[4] 8 Sawy. 116.

[5] 5 Cr. 311; *acc.* U. S. *v.* Twenty-eight Packages of Pins, Gilp. 306.

[6] For other instances of mere preparation, see P. *v.* Compton, 123 Cal. 403, 56 Pac. Rep. 44; Brown *v.* S., 95 Ga. 481, 20 S. E. Rep. 495; Lovett *v.* S., 19 Tex. 174.

[7] 9 Cox C. C. 100.

[8] See P. *v.* Mann, 113 Cal. 76, 45 Pac. Rep. 182.

[9] 49 Miss. 685.

attempt to forge auditor's warrants. In Regina *v.* Brown[1] the court intimated that merely drawing a loaded pistol from the pocket for the purpose of killing is a punishable attempt to kill.[2] In People *v.* Stites[3] the defendant procured a dynamite bomb and started from his house to put it on the railroad track, but was arrested at some distance from the track; he was held guilty of an attempt to obstruct the track. In Territory *v.* Reuss[4] the defendant put a lighted bomb on the porch of a house and attempted to call an inmate of the house to the door; this was a punishable attempt to kill.[5] In several cases it has been held that where the defendant made false representations for the purpose of getting property, but the deceit was discovered before the property was given up, he was guilty of an attempt to obtain by false pretences.[6]

A series of cases on indictments for attempt to commit arson illustrate the nice distinctions required. The defendant bought matches to set the fire; he cannot yet be punished.[7] He solicited another to burn and furnished him with materials; there is no punishable attempt.[8] He prepared combustibles at the house, went to a third party, solicited him to set the fire, and started with him toward the house. Query — whether a punishable attempt has been committed.[9] The combustibles were arranged and another who was on the spot was solicited to light it; the attempt is punishable.[10] The defendant himself having arranged the combustibles lit a match, which went out,[11] or lit a candle and placed it among

[1] 10 Q. B. D. 381, 52 L. J. M. C. 49, 48 L. T. Rep. 270, 31 W. R. 460, 15 Cox C. C. 199, 47 J. P. 327.

[2] In the similar case of Burton *v.* S., 109 Ga. 134, 34 S. E. Rep. 286, where the pistol was caught in the coat lining, it was held not to amount to an assault with intent to kill.

[3] 75 Cal. 570, 17 Pac. Rep. 693.

[4] 5 Mont. 605.

[5] For other cases where the act had gone far enough to be punishable see R. *v.* Chapman, 1 Den. C. C. 432; Lewis *v.* S., 35 Ala. 380; Clark *v.* S., 86 Tenn. 511, 8 S. W. Rep. 145.

[6] R. *v.* Ball, C. & M. 249; R. *v.* Eagleton, Dears. 515, 24 L. J. M. C. 158, 3 C. L. R. 1145, 1 Jur. N. S. 940, 4 W. R. 17, 6 Cox C. C. 559; R. *v.* Rigby, 7 Cox C. C. 507; R. *v.* Cheeseman, L. & C. 140, 31 L. J. M. C. 89, 8 Jur. N. S. 143, 5 L. T. Rep. 717, 10 W. R. 255, 9 Cox C. C. 100; R. *v.* Hensler, 22 L. T. Rep. 691, 19 W. R. 108, 11 Cox C. C. 570.

[7] R. *v.* Taylor, 1 F. & F. 511 (*semble*).

[8] McDade *v.* P., 29 Mich. 50; S. *v.* Bowers, 35 S. C. 262, 14 S. E. Rep. 488. *Contra*, McDermott *v.* P., 5 Park. Cr. 102; P. *v.* Bush, 4 Hill 133 (statutory).

[9] It is punishable under the statute: C. *v.* Peaslee, 177 Mass. 267, 59 N. E. Rep. 55.

[10] S. *v.* Hayes, 78 Mo. 307.

[11] R. *v.* Taylor, 1 F. & F. 511; R. *v.* Goodman, 22 U. C. C. P. 338.

the combustibles,[1] or actually lit the combustibles,[2] he has committed a crime.

Another interesting series of cases is upon indictments for attempt to commit burglary. The defendant takes an impression of a lock of the house in order to get a false key made; he is not yet guilty of a criminal attempt.[3] He procures tools and meets a confederate at a distance from the house; he is not guilty.[4] He hires a hack to go to the house; he is not guilty.[5] He reaches the house and looks at it to examine it; not guilty.[6] He carries his tools to the house, lays them down, and goes to get a tool he had forgotten,[7] or examines the house to pick out a fit place to break; [8] guilty. He breaks down the gate of the yard; [9] he goes up the steps to the porch; [10] he tries to break open the door;[11] he breaks glass in the window; [12] he breaks open the door and fires into the house; [13] he is undoubtedly guilty.

Other series of cases in which the line between preparation and punishable attempt has been considered are cases of attempted poisoning,[14] and of attempting to rescue a prisoner.[15]

It seems to be clear that the common-law misdemeanor of attempting to commit an offense cannot be accomplished by the solicitation of another to do an act. Attempt is the act of one who is himself to commit the intended offense, and if the offense is committed he will become principal; solicitation is the act of one who means to secure another to commit the intended offense, and if the offense is committed he will become (in case of a felony) accessory before the fact. A solicitor to a crime which he does

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1 S. *v.* Johnson, 19 Ia. 230.

2 S. *v.* Dennin, 32 Vt. 158.

3 In Griffin *v.* S., 26 Ga. 493, he was held guilty of a statutory attempt; *sed quære.*

4 P. *v.* Youngs, 122 Mich. 292, 81 N. W. Rep. 114.

5 Groves *v.* S., 42 S. E. Rep. 755 (Ga.).

6 R. *v.* McCann, 28 U. C. Q. B. 514.

7 P. *v.* Lawton, 56 Barb. 126 (perhaps statutory).

8 P. *v.* Sullivan, 173 N. Y. 122, 65 N. E. Rep. 989.

9 C. *v.* Smith, 6 Phila. 305.

10 C. *v.* Clark, 20 Phila. 395, 10 Pa. Co. Ct. 444, 48 Leg. Int. 450.

11 S. *v.* Jordan, 75 N. C. 27. *Contra,* Fonville *v.* S., 62 S. W. Rep. 573 (Tex. Cr.).

12 R. *v.* Spanner, 12 Cox C. C. 155; C. *v.* Shedd, 140 Mass. 451, 5 N. E. Rep. 254.

13 S. *v.* Montgomery, 109 Mo. 645, 19 S. W. Rep. 221.

14 Peebles *v.* S., 101 Ga. 585, 28 S. E. Rep. 920; R. *v.* Dale, 6 Cox C. C. 14; C. *v.* McLaughlin, 105 Mass. 460; C. *v.* Kennedy, 170 Mass. 18, 48 N. E. Rep. 770.

15 Patrick *v.* P., 132 Ill. 529, 24 N. E. Rep. 619; P. *v.* Webb, 127 Mich. 29, 86 N. W. Rep. 406.

not intend to join in actually committing is therefore not guilty of an attempt.[1]

Thus in Regina *v.* Williams,[2] an indictment for attempt to administer poison by giving the poison to X, who knew its nature, with directions to administer it, it was held that the defendant must be discharged; but upon a subsequent indictment for a misdemeanor unnamed (obviously for a solicitation) the defendant was convicted.[3]

In several states a statutory definition of attempt has been adopted, to the effect that whoever shall attempt to commit an offense "and in such attempt shall do any act towards the commission of such offense" shall be guilty of a crime. Under this statute, solicitation, at least when united with any acts of mere preparation, has been held a punishable attempt.[4]

In considering whether an attempt has gone far enough to justify punishment it is immaterial that the defendant may voluntarily desist from his attempt before it succeeds. If his attempt went far enough to become dangerous to the public and therefore criminal, he had become guilty of a crime, and his subsequent repentance and withdrawal from the crime, whether voluntarily or from fear of detection, could not purge his guilt.[5] Even if he went further and himself prevented the consummation of the attempt, he would still remain guilty of what he had actually done.

IV. Success of the Attempt.

If an attempt succeeds, it cannot be punished as an attempt; for in the nature of things a mere attempt must be unsuccessful. If, therefore, at the trial of an indictment for attempt the evidence proves that the crime intended has been committed, there must be

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[1] R. *v.* Williams, 1 C. & K. 589, 1 Den. C. C. 39 (but see R. *v.* Clayton, 1 C. & K. 128, *contra*, on the ground that in misdemeanors all parties are principals — a doctrine which, however, does not mean that all parties are really actors); McDade *v.* P., 29 Mich. 50; P. *v.* Youngs, 122 Mich. 292, 81 N. W. Rep. 114; Stabler *v.* C., 95 Pa. St. 318, 40 Am. Rep. 653; Hicks *v.* C., 86 Va. 223, 9 S. E. Rep. 1024; S. *v.* Butler, 8 Wash. 194, 35 Pac. Rep. 1093.

[2] *Supra.*

[3] Cresswell, J., in R. *v.* Roberts, Dears. 539, 25 L. J. M. C. 17.

[4] Griffin *v.* S., 26 Ga. 493; C. *v.* Peaslee, 177 Mass. 267, 59 N. E. Rep. 55 (*semble*); S. *v.* Hayes, 78 Mo. 307; P. *v.* Bush, 4 Hill 133; McDermott *v.* P., 5 Park. Cr. 102; S *v* Bowers, 35 S. C. 262, 14 S. E. Rep. 488. *Contra*, P. *v.* Youngs, *supra.*

[5] Taylor *v.* S., 50 Ga. 75 (*semble*); S. *v.* Elick, 7 Jones (N. C.) 68; Glover *v.* C., 86 Va. 382, 10 S. E. Rep. 420; R. *v.* Goodman, 22 U. C. C. P. 338.

an acquittal.[1] The success of an attempt, however, means the accomplishment of the entire *act* intended, not the attainment of a desired result. The defendant, intending to obtain property by false pretenses, made the pretenses and got the property; but the pretenses not being believed, the property was not given as a result of the pretenses, but for some other reason. The desired end has been attained without substantive crime; but the attempted criminal act not having been accomplished, the defendant is guilty of a criminal attempt.[2]

If, however, an attempt made in one jurisdiction succeeds in a different jurisdiction, there would seem to be no reason for refraining from punishing the attempt. The crime has been committed, the state injured, the injury is not merged in a greater offense; the attempt must be punished, or the offender will escape punishment, at least in this jurisdiction. And such appears to be the law.[3]

J. H. Beale, Jr.

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[1] R. *v.* Nicholls, 2 Cox C. C. 182; Graham *v.* P., 181 Ill. 477, 55 N. E. Rep. 179. So of solicitation: R. *v.* Luddington, 9 C. & P. 79.

[2] R. *v.* Mills, 7 Cox C. C. 263 (*semble*); R. *v.* Hensler, 22 L. T. Rep. 691, 19 W. R. 108, 11 Cox C. C. 570; P. *v.* Gardner, 144 N. Y. 119, 38 N. E. Rep. 1003.

[3] R. *v.* Krause, 18 T. L. Rep. 238, 66 J. P. 121 (solicitation); Regent *v.* P., 96 Ill. App. 189 (conspiracy); S. *v.* Terry, 109 Mo. 601, 19 S. W. Rep. 206 (*semble*).